IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-739489-D6 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: James P. PENDERGRASS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1876

James P. PENDERGRASS

This appeal has been taken in accordance with title 46 United States Code 239 (g) and title 46 Code of Federal Regulations 137.30-1.

By order dated 4 June 1970, an Examiner of the United States Coast Guard at New York, N.Y. revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as 3rd cook on board SS PRODUCER under authority of the document above captioned, Appellant:

(1) on 3 March 1968, at Antwerp, Belgium, wrongfully threatened the second mate, one Robert Grier, with bodily harm;

(2) on the same date, wrongfully failed to perform duties at Antwerp and on departure therefrom;

(3) on 28 February 1968, wrongfully, perversely, and without consent, touched the private parts of one D. Moscoffian, a crew member, at sea;

(4) on 2 March 1968 at Antwerp, belgium, wrongfully threatened bodily harm to Dr. Moscoffian;

(5) on 3 March 1968 at Antwerp, Belgium, wrongfully used foul and abusive language to the second mate;

[a specification originally numbered 6 was ordered merged with 5, while original specification 7 and 8 were dismissed]

and, while serving as 3rd cook on board SS SOUTHWESTERN VICTORY under authority of his document, Appellant:

(9) on 5 December 1968, at Zeebrugg, Belgium, wrongfully failed to perform his duties; and

(10) on 6 December 1968, at Zeebrugg, Belgium, wrongfully failed to perform his duties; and

(11) on 3 December 1968, at Oostende (Ostend), Belgium, wrongfully attempted to batter one kenneth Roberts, a member of the crew, with a bar stool.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of live witnesses, depositions on interrogatories, and voyage records of both PRODUCER and SOUTHWESTERN VICTORY.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 6 November 1970. Appeal was timely filed.

## FINDINGS OF FACT

From 16 February 1968 to 5 March 1968, Appellant was serving as second cook on board SS PRODUCER and acting under authority of his document.

David Moscoffian, age sixteen, was a crew messman aboard PRODUCER. About 23 February when the vessel was at sea Appellant approached Moscoffian at work and called him "Twiggy" and "honey." Appellant invited Moscoffian to his room, saying that he would give him a beer. Appellant also proposed to Moscoffian that when the vessel reached port they should go together to a motel and Appellant would buy clothes for the messman.

On 28 February 1968, while the vessel was still at sea, Moscoffian, who had been playing cards in the messroom, left the messroom to go to bed. Entering his fo'c'stle, which he shared with two others, he undressed and got into his bunk, a lower. He drew the curtain and turned off the bunk light. He heard the door of the room being opened. The curtain was opened. The messman turned on the bunk light and saw Appellant with the upperpart of his body extending over the bunk. Appellant turned the bunk light off, addressed Moscoffian as "Twiggy" and "sweetheart," and touched Moscoffian's testicles. He invited the messman to come to his

room, as he wished to talk to him. Moscoffian made a noise, got out of the bunk, and climbed up into the bunk above his. Appellant left the room.

Moscoffian reported the matter to the master on 29 February 1968. The master promised to investigate. On 2 March 1968 the vessel reached Antwerp. Moscoffian was in the messroom when Appellant entered, addressed him in terms like those mentioned above and made propositions to the same effect as those mentioned above. When Moscoffian declared that he wished to have nothing to do with Appellant, Appellant smashed a cup on the table and said, "God dammit, now you are going to get it. I'm going below and get a gun and I'm going to kill you."

On 3 March 1968, Appellant, who had been ashore, arrived at the vessel about 0600 and introduced three unauthorized visitors, one male and two female, into the crew mess. When the second mate, Grier, who was on watch, came to the messroom, on notice of the presence of unauthorized persons, and ordered Appellant to get the visitors of the ship, Appellant used foul and abusive language to Grier and threatened to hit him on the skull with a fire axe. The local police were called for, but before they arrived, Appellant and his friends had left the ship.

Appellant performed no duties on the vessel that day until after the vessel had sailed from antwerp.

Appellant was discharged from the vessel at amsterdam on 5 March 1968 "for cause."

With respect to his service aboard SOUTHWESTERN VICTORY, Appellant was serving under authority of his document as 3rd cook aboard the vessel on all dates in question.

On 5 and 6 December 1968 he wrongfully failed to perform his duties while the vessel was at Zeebrugg, Belgium.

On 3 December 1968, when the vessel was at Oostende, Belgium, appellant and one Jerry Luckett, a wiper aboard the vessel, were in a bar called "the Playboy Club." One Kenneth Roberts, another member of the crew, entered the club. While Roberts, apparently closing a door, had his back to Appellant, Appellant attempted to hit Roberts on the head with a bar stool. Luckett disarmed Appellant before the battery could be consummated. All members of SOUTHWESTERN VICTORY's crew were ordered out of the club.

[I am substituting my own findings of fact for those of the Examiner, since the Examiner's are inadequate for three reasons. First, to state that, "It has been proved that X is Y," while an

acceptable legal conclusion, is not a "finding" that "X is Y." Second, most of the operative facts are stated only in the Examiner's opinion, not in his findings. Third, most of those facts concealed in the opinion are derivable only by inference, since most of the opinion is merely a recitation that a witness "testified that..."

[I need not set forth separate reasons for my findings since the bases stated by the Examiner are adequate.]

## BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended in Appellant's first point that the decision of the Examiner was arbitrary, unreasonable, and not supported by "the weight" of substantial evidence. This argument is directed to the findings that Appellant made "unnatural advances upon a fellow seaman." It is specifically urged that since R.S. 4450 provides for the right of cross-examination of witnesses, Appellant was denied his rights because some persons whose statements were attached to an official log entry of PRODUCER were not subject to cross-examination, apparently on a theory that the testimony of the victim of the "advances" had to be corroborated by the testimony of another witness.

Appellant's second point is:

> "It is further submitted that the hearing examiner gave undue weight to logbook entries which were replete with hearsay, erroneously admitted, and prejudicial."

APPEARANCE: Newark Legal Services Project, Newark N.J. by Richard N. Tilton, Esq.

## OPINION

### I

My first observation on this appeal is that the role of an administrator is sometimes frustrating. The decision of the Examiner was served upon Appellant on 6 November 1970, five months after the hearing ended. Notice of appeal was filed by a new counsel who had not represented Appellant during the hearing. On 12 February 1971, although counsel had not asked for a copy of the record, a copy was sent to him. On 13 April 1971, within the 60 day period allowed for perfecting an appeal, counsel declared that he had read the transcript and did not intend to file "any additional papers" in the case.

It is disappointing that such a broad brush allegation of error as the second one asserted before the transcript was even prepared is not supported by specific references to the record grouped in orderly fashion.

The suspicion might arise that perusal of the record dissuaded counsel from attempting to buttress the assertions made earlier; nevertheless, grounds for appeal have been asserted and I am required to make decision on the record.

II

To take Appellant's second allegation of error first, as the less specific in that in asserts no supporting references at all, I can say only that, with the possible exception of the log entry dealing with the episodes involving David Moscoffian, all log entries in evidence were made in accordance with 46 U.S.C. 702 and thus constituted not only admissible evidence but prima facie evidence of the facts recited therein. Sight is often lost of the fact that the hearsay nature of a record kept in the regular course of business, as to the person who makes the record does not disqualify the record, from admissibility as an exception to the hearsay rule. Added to that is the extra dignity conferred on an official log book entry.

Insofar as Appellant describes the log book entries as "replete with hearsay" and "erroneously admitted," without more specificity, I can say only that they were properly admitted and not only constitute and exception to the "hearsay rule" but constitute prima facie evidence of the facts recited. 46 CFR 137.20-107. With respect to Appellant's use of a third descriptive term, "prejudicial," I cannot give a direct answer. Matters judged "prejudicial" to a party are usually matters brought before the trier of facts erroneously. Once matters are brought in erroneously, the question of whether the error was prejudicial or not must be considered. Since the log entries in question were not erroneously admitted into evidence they were not, in some abstract sense, "prejudicial."

In the absence of error in connection with the admission of the evidence, I must construe the word "prejudicial" to mean "damaging." But all evidence against a person is damaging. The resolution is possibly best expressed in the words of counsel at hearing in this very case. When a deposition record was offered in evidence, counsel was asked whether he had any objection. His answer, realistically formulated, was "It's ruinous, but it seems proper. No objection." R-100.

III

Appellant's one concrete and identifiable ground for appeal may be considered now. He complains that the Examiner's decision is "arbitrary, unreasonable, and not supported by the weight of substantial evidence" and directs attention to the specification alleging improper touching of the private parts of the person Moscoffian. It is said that the matter is so serious that the testimony of the witness Moscoffian must be corroborated by more than a log book entry with statements attached, must, in fact be corroborated by the testimony of other witnesses whose testimony was subject to cross-examination. The subpoena powers conferred by 46 U.S.C. 239(d) is mentioned and the right to cross-examine witnesses conferred by 46 U.S.C. 239(d) is referred to.

In general it must be pointed out that Appellant, represented by competent counsel at hearing had the opportunity to cross-examine every witness who appeared against him either in person or by deposition and exercised the right in each instance but one, deposed witness. With respect to the matters in the specification complained of, this general consideration does not control. Closer scrutiny of Appellant's argument is required.

He says, in effect,:

> (1) when homosexual conduct is charged as misconduct under R.S. 4450, the testimony of the victim must be corroborated before findings can be predicated thereon, and
>
> (2) the corroboration must be more than a log book entry supported by attached statement of witnesses who are not subject to cross-examination.

I am far from convinced, although I need not decide the question here, that the official log entry with attached statements constitutes prima facie evidence of the offense under 46 CFR 137.20-107(b). It is, however, admissible under paragraph (a) as an exception to the hearsay rule, and thus can serve as corroboration. Most important is the fact that corroboration of the testimony of the live witness was not required. His testimony was of the quality and weight to support the Examiner's findings on the point.

IV

Appellant's act of perversion alone, without regard to the many other offenses found proved, merits the order of revocation.

ORDER

The order of the Examiner dated at New York, N.Y. on 4 June

1970, is AFFIRMED.

C.R. BENDER
Admiral, United States Guard
Commandant

Signed at Washington, D.C., this 1st day of May 1972.

INDEX

Evidence

Log entries

Log entries

Prima facie case, establishment of
Exception to hearsay rule

Prejudice

Log entries not prejudicial

Sexual perversion

Evidence held sufficient